Norkin v. DLA Piper Rudnick Gray Cary L.L.P. Doc. 20

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID NORKIN

Plaintiff,

Civil Action No. 05 Civ. 9137(DC)

-against-

DLA PIPER RUDNICK GRAY CARY LLP,

Defendant.

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DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

On approximately May 9, 2005, plaintiff David Norkin ("Norkin") commenced this case in state court in New York County. As the sole defendant, he named the law firm of DLA Piper Rudnick Gray Cary LLP ("Piper").

On October 26, 2005, Piper removed the case to this Court. As grounds for removal, Piper contended that the case arises in or is related to two cases under Title 11: Norkin's own Chapter 7 bankruptcy case and the Chapter 11 bankruptcy case of Britestarr Homes, Inc. ("Britestarr"). See 28 U.S.C. § 1334(b); 28 U.S.C. § 1452(a).

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Norkin has now moved to remand the case under 28 U.S.C. § 1334(c)(2), which provides as follows:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

In the alternative, Norkin has asked the Court to exercise its discretion to remand the case under 28 U.S.C. § 1452(b).

Norkin has attempted to bolster his motion by expressly relinquishing any claims concerning the alleged loss of his Britestarr shares,[1] which, he admits, belong solely to his bankruptcy trustee. See Memorandum of Law in Opposition to Motion to Dismiss and/or for Summary Judgment at 6 n. 1. Despite that maneuver, however, the Court should deny the motion because Norkin's claims remain inextricably entwined with his personal bankruptcy case and with the Britestarr bankruptcy case.

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[1] See, e.g., Memorandum in Support of Motion to Remand at 5 (despite suggestions to the contrary in the complaint, "[p]laintiff cannot recover – and is not seeking – any damages as a result of . . . the loss by plaintiff of his Britestarr shares"); id. at 12 ("plaintiff will not seek damages from defendant with respect to plaintiff's ownership of Britestarr shares") (emphasis in original); see also Memorandum of Law in Opposition to Motion to Dismiss and/or for Summary Judgment at 6 ("plaintiff is not seeking in this action damages resulting from the loss of plaintiff's ownership of Britestarr stock"). Norkin has abandoned any claim to the shares because he recognizes that by asserting his trustee's claim, he lent support to the contention that this case arises in his bankruptcy case. In effect, Norkin has given up his most lucrative claim so that he can attempt to escape from federal court.

I. THE COURT NEED NOT ABSTAIN UNDER § 1334(c)(2)

A. The Applicable Legal Principles

Under § 1334(c)(2), the question of mandatory abstention turns on whether the case "aris[es] under title 11 or aris[es] in a case under title 11" or whether it is merely "related to a case under title 11." If the case "aris[es] under title 11 or aris[es] in a case under title 11," then the Court has no duty to abstain. If, on the other hand, the case is merely "related to a case under title 11," then the Court must abstain.

In deciding whether a case falls into the first category or the second, the Second Circuit has invoked the distinction between "core" and "non-core" proceedings in 28 U.S.C. § 157(b). See, e.g., Mt. McKinley Ins. Co. v. Corning Inc., 399 F.3d 436, 447 (2d Cir. 2005). In so doing, the Court has effectively equated cases "arising under title 11 or arising in a case under title 11" with "core" proceedings, while it has equated cases that are merely "related to a case under title 11" with "non-core" proceedings. See, e.g., Luan Investment S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.), 304 F.3d 223, 232 (2d Cir. 2002) (holding that, under § 1334(c)(2), a court must abstain only with respect to non-core matters). Therefore, "[t]he first step in a Section 1334(c)(2) abstention analysis is resolution of whether the proceeding is 'core.'" Mt. McKinley, 399 F.3d at 447.

The distinction between "core" and "non-core" proceedings derives from Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). In that case a plurality of the Supreme Court held that bankruptcy courts, as Article I courts, can make final factual determinations only in cases involving rights that lie at or near the "core" of the bankruptcy power. See id. at 87. By contrast, a bankruptcy court has no such power in cases involving rights that are "'independent of and antecedent to the reorganization petition that conferred jurisdiction upon'" the bankruptcy court itself. Mt. McKinley, 399 F.3d at 447, quoting Marathon, 458 U.S. at 84.

In response to Marathon, Congress enacted the 1984 amendments to the bankruptcy code, which distinguish between "core" proceedings, in which bankruptcy courts have plenary power to make findings of fact and conclusions of law, and non-core proceedings, in which bankruptcy courts have the power only to make proposed findings of fact and conclusions of law. Mt. McKinley, 399 F.3d at 448-49; see 28 U.S.C. § 157(b) (defining "core" proceedings and the bankruptcy courts' plenary power to adjudicate them); 28 U.S.C. § 157(c) (defining the bankruptcy courts' more limited power to adjudicate "non-core" proceedings). The Second Circuit has held that the term "'core proceedings' should be given a broad interpretation that is close to or congruent with constitutional limits as set forth in Marathon, and that Marathon is to be construed narrowly." In re United States Lines, 197 F.3d 631, 636 (2d Cir. 1999) (internal quotation marks omitted); accord Mt. McKinley, 399 F.3d at 448.

In Mt. McKinley the Second Circuit said that, in determining whether a state-law contract dispute is "core" or "non-core," it looks to "'(1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization.'" Mt. McKinley, 399 F.3d at 448, quoting In re United States Lines, 197 F.3d at 637. The Court continued:

> The nature of the proceeding is also important. "Proceedings can be core by virtue of their nature if either (1) the type of proceeding is unique to or uniquely affected by the bankruptcy proceedings, or (2) the proceedings directly affect a core bankruptcy function."

Id., quoting In re United States Lines, 197 F.3d at 637.

These factors point to the conclusion that Norkin's claims are core and that the Court, therefore, has no obligation to abstain under § 1334(c)(2).

B. Under the Second Circuit's Analysis, Norkin's Claims are Core

In this case Norkin complains of malpractice by the lawyers who, he says, represented him in his bankruptcy case. In ¶ 17 of his complaint, he expressly alleges that the malpractice had a negative effect on his bankruptcy case. He implies that his recovery in this case may represent the only means of satisfying the claims that his trustee and creditors have against him. Under the Second Circuit's analysis in cases such as Mt. McKinley and In re United States Lines, these are "core" claims that the Court need not abstain from hearing.

Unlike non-core claims, Norkin's claims are neither "'independent of" nor "'antecedent to'" his 1997 reorganization petition. Mt. McKinley, 399 F.3d at 448, quoting In re United States Lines, 197 F.3d at 637. To the contrary, his claims concern post-petition conduct by the lawyers who allegedly represented him in matters affecting the potential resolution of bankruptcy litigation concerning a major asset of his bankruptcy estate. His complaint, therefore, advances claims that arose after, and that are inextricably entwined with, "'the reorganization petition that conferred jurisdiction upon'" the bankruptcy court. Mt. McKinley, 399 F.3d at 447, quoting Marathon, 458 U.S. at 84. Because those core claims "aris[e] in" Norkin's bankruptcy case under title 11, this Court has no duty to abstain. 28 U.S.C. § 1334(c)(2).

Furthermore, from the declaration of Norkin's counsel, it appears that Norkin has agreed to give up a portion of his recovery in this case in order to further his discharge in bankruptcy. The declaration specifically describes an informal, unwritten, and (thus far) unapproved agreement under which Norkin will "cede a portion of the recovery to his bankruptcy estate in exchange for a release of certain claims the estate might have against" him. In similar circumstances, the Second Circuit has held that state-law claims were core. See In re United States Lines, 197 F.3d at 638 (state-law claims concerning insurance coverage were core because policies represented only asset available to pay creditors); compare Mt. McKinley, 399 F.3d at 449 (claims concerning insurance coverage were not core because policies were "not the only or even the major assets available to pay" creditors). Here, too, therefore, the Court should conclude that Norkin's claims are core claims that "aris[e] in" a case under title 11 and that the Court, accordingly, has no duty to abstain. 28 U.S.C. § 1334(c)(2).

In summary, because Norkin's claims arose well after his bankruptcy petition (i.e., because they are not "antecedent to" the petition), because the claims bear directly on key events and developments in his bankruptcy case, and because he hopes to use the claims to further his reorganization and his ultimate exit from bankruptcy, the Court need not abstain from this core proceeding.[2]

C. Counsel's Declaration Confirms that the Claims are Core

Norkin's counsel's declaration provides further evidence that this case is both "'uniquely affected by the bankruptcy proceedings,'" so as to be a core proceeding. Mt. McKinley, 399 F.3d at 448, quoting In re United States Lines, 197 F.3d at 637. The declaration specifically shows that in this case Norkin is functioning, in effect, as his trustee's surrogate or proxy, collecting assets that the trustee intends to use both to settle the estate's claims against Norkin and to defray the claims of Norkin's many creditors. See Declaration of Richard M. Asche, p. 2 (discussing the "agreement" under which Norkin would "cede a portion of the recovery [in this case] to his bankruptcy estate in exchange for a release of certain claims the estate might have against" him).

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[2] At pp. 11-12 of his motion, Norkin argues at length that because he has disclaimed any right to recover for the loss of the Britestarr shares, his claims do not belong to his bankruptcy estate. Yet, as the Fourth Circuit has held, a bankruptcy debtor's purely personal claims may still "aris[e] in" his bankruptcy case if, as in this case, they consist of legal malpractice claims against the lawyers who represented him in his bankruptcy case. Grausz v. Englander, 321 F.3d 467, 471-72 (4th Cir. 2003).

Because of the trustee's pecuniary interest in Norkin's recovery, the trustee may claim the right to direct the proceedings, to accept or veto a settlement, or to participate in other ways. Furthermore, because the precise extent of the trustee's interest remains undefined (and unapproved by any court), Norkin and the trustee may eventually find themselves in litigation, whether in New York or in bankruptcy court in Connecticut, over the size of the trustee's share in any recovery.

In essence, Norkin has agreed to assign some portion of his recovery to his trustee in exchange for a release of the trustee's claims against him. Through that assignment, the trustee has thereby become a shadow plaintiff with a quasi-beneficial interest in the action. For those reasons, Norkin's claims plainly concern "the administration of the estate," as well as "the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship." This is, therefore, a core proceeding under 28 U.S.C. § 157(b)(2)(a) and § 157(b)(2)(O),[3] as to which the Court has no duty to abstain. 28 U.S.C. § 1334(c)(2).

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[3] While Norkin studiously avoids disclosing the precise nature of the trustee's claims against him, the likely candidates include claims for an order to turn over the property of the estate, claims to avoid and recover preferential payments, claims to avoid and recover fraudulent conveyances, claims concerning whether certain debts are dischargeable, and objections to discharge. Each of these claims involves a core proceeding. See 28 U.S.C. § 157(b)(2)(E); 28 U.S.C. § 157(b)(2)(F); 28 U.S.C. § 157(b)(2)(H); 28 U.S.C. § 157(b)(2)(I); 28 U.S.C. § 157(b)(2)(J).

D. Because Norkin's Claims Would Have No Practical Existence But For Britestarr's Bankruptcy, They Arise in Britestarr's Bankruptcy Case

In determining whether a claim "aris[es] in" a bankruptcy case, many courts have asked whether the claim "'would have no practical existence but for the bankruptcy.'" See, e.g., Longacre Master Fund, Ltd. v. Telecheck Servs., Inc. (In re Casual Male Corp.), 317 B.R. 472, 476 (Bankr. S.D.N.Y. 2004), quoting Bergstrom v. Dalkon Shield Claimants Trust (In re A.H. Robins Co.), 86 F.3d 364, 372 (4th Cir.); cert. denied, 519 U.S. 993 (1996); accord Grausz v. Englander, 321 F.3d 467, 471-72 (4th Cir. 2003). If the answer is, yes, then the claim "aris[es] in" bankruptcy, and the Court need not abstain.[4]

Thus, for example, in In re Casual Male, 317 B.R. at 475, the plaintiff brought suit for the breach of a contract to sell a claim against a bankrupt debtor. Because a claim against such a debtor "would have no practical existence but for the bankruptcy," the bankruptcy court held that it "arose in" the bankruptcy case for purposes of § 1334(b). Id. at 477.

In reaching that decision, the Casual Male court relied on the Fourth Circuit's decision in A.H. Robins, a case arising in the extensive bankruptcy litigation concerning the manufacturer of the Dalkon Shield. In that case the district court had issued an order modifying the fees that the tort claimants' attorneys could collect out of a pro rata distribution. A.H. Robins, 86 F.3d at 372. Because the claimants and their attorneys would have received no distribution at all but for a trust created in the bankruptcy, the Fourth Circuit held that the case "arose in" the bankruptcy. Id.

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[4] Technically, these cases do not concern whether the court had a duty to abstain under § 1334(c)(2), but whether the court had subject matter jurisdiction under § 1334(b) because the claims "ar[ose] in . . . cases under title 11." Nonetheless, because § 1334(c)(2) does not require a court to abstain from proceedings "arising in a case under title 11," the interpretation of that phrase in § 1334(b) speaks directly to the scope of the duty to abstain under § 1334(c)(2).

The Fourth Circuit recently applied A.H. Robins in another case that is quite similar to this one. In Grausz, 321 F.3d at 471, the plaintiff complained that the defendant law firm had committed legal malpractice in advising him about the accuracy of the amended schedules to his bankruptcy petition. Although the plaintiff had asserted only a state-law claim that belonged solely to him, the Fourth Circuit, following A.H. Robins, recognized that the claim "originated in the firm's work for Grausz in his bankruptcy case." Id. Because the claim, therefore, would have had "no practical existence" but for the bankruptcy, the Court held that it arose in the bankruptcy case. Id.

Here, too, Norkin's claims would have no practical existence but for his bankruptcy. Like Grausz, Norkin claims that Piper "committed malpractice in [his] bankruptcy case." Grausz, 321 F.3d at 472. In particular, Norkin claims that Piper committed malpractice "by, among other things, negligently failing to advise" him of a proposal that, he says, would have permitted him to settle ABB's bankruptcy litigation against him. Id. Therefore, just as Grausz's malpractice claim against his bankruptcy attorneys arose in Grausz's bankruptcy case (see id.), so too does Norkin's malpractice claim arise in his pending bankruptcy case in Connecticut. The Court, accordingly, has no duty to abstain under § 1334(c)(2).[5]

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[5] Norkin's claims also "aris[e] in" the Britestarr bankruptcy case. Norkin's central allegation is that Piper should not have recommended that Britestarr file for bankruptcy and that he resign in favor of a court-appointed trustee, but that the firm should, instead, have recommended that Britestarr accept some alleged settlement offer from ABB. Because Norkin would have no claims had Britestarr not filed for bankruptcy and asked for the appointment of a Chapter 11 trustee to take Norkin's place, the Court need not abstain under § 1334(c)(2).

II. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO REMAND THE CASE UNDER § 1452(b)

As a fallback position, Norkin argues that even if the Court need not abstain under § 1334(c)(2), it should either exercise its discretion to abstain under 28 U.S.C. § 1334(c)(1) or remand the case on equitable grounds under 28 U.S.C. § 1452(b). Neither statute warrants the relinquishment of federal jurisdiction in this case.

Section 1334(c)(1) states:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Section 1452(b) states, in pertinent part, that if a defendant removes a case on the ground that it arises under title 11, or arises in or relates to a case under title 11, "[t]he court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." The equitable remand analysis under § 1452(b) is essentially the same as the abstention analysis under § 1334(c)(1). New York City Employees' Retirement Sys. v. Ebbers (In re Worldcom Inc. Secs. Litigation), 293 B.R. 308, 334 (S.D.N.Y. 2003).

That analysis is "informed by and interpreted according to 'principles developed under the judicial abstention doctrines.'" Id. at 332, quoting In re Pan American Corp., 950 F.2d 839, 846 (2d Cir. 1991). "Those principles provide that federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them'" (id., quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)), and that they "may abstain only for a few 'extraordinary and narrow exception[s].'" Id., quoting Colorado River, 424 U.S. at 813.

Those exceptions involve considerations of "comity and federalism, judicial economy, and efficiency." Id.

Citing principles that derive from Drexel Burnham Lambert Group, Inc. v. Vigilant Ins. Co., 130 B.R. 405, 407 (S.D.N.Y. 1991), Norkin argues that, in deciding whether to abstain under § 1334(c)(1) or to remand the case under § 1452(b), the Court should consider the following seven factors:

> (1) the effect on the efficient administration of the bankruptcy estate; (2) the extent to which issues of state law predominate; (3) the difficulty or unsettled nature of the applicable state law; (4) comity; (5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (6) the existence of the right to a jury trial; and (7) prejudice to the involuntarily removed defendants.[6]

A review of these factors demonstrates that they weigh heavily against discretionary abstention or remand and that the federal courts should retain jurisdiction over this case.

First, because Norkin's closely-related bankruptcy case is pending in federal bankruptcy court in Connecticut, it will in no way increase the efficient administration of his estate to remand this case to state court. Rather, if the Court does not simply dismiss the case outright for failure to state a claim, it will best serve the efficient administration of the estate for the federal courts to retain this case and for this Court to transfer it to Connecticut, as Piper has requested.[7]

Second, state law issues do not predominate. To the contrary, both in this case and in Britestarr's Connecticut case against Piper, the central issues include the propriety of Piper's recommendation that Britestarr: (1) file for bankruptcy (at a time when, Norkin admits, it was "out of cash");[8] and (2) request the appointment of a Chapter 11 trustee to replace Norkin, who had previously pleaded guilty to bankruptcy fraud.[9] A federal court is best able to assess these central issues of federal bankruptcy law.

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[6] On occasion, courts in this district have used different phrasing and have included other factors. See, e.g., In re Worldcom Inc. Secs. Litigation, 293 B.R. at 332.

[7] Norkin contends (at 14) that it will impose a burden on his trustee if the Court requires him to pursue his claims in bankruptcy court (presumably meaning a Connecticut bankruptcy court). The short answer to Norkin's contention is that Norkin's trustee has no obligation to pursue the claims if, as it appears, he deems them unmeritorious.

Third, to the extent that the case involves issues of state law, they are neither difficult nor unsettled. They include legal issues that are common to all legal malpractice cases, such as whether the firm breached the standard of care or had a conflict of interest. They also include routine factual issues, such as whether ABB ever actually made any settlement offer, whether Piper informed Norkin of any such offer, whether Norkin's other lawyers informed him of any such offer, and whether (as he said in his deposition) Norkin "would never have signed" an agreement containing those terms. A state court has no advantage over a federal court in a case involving these issues. See In re Worldcom Inc. Secs. Litigation, 293 B.R. at 332 (stating that the plaintiff had "not identified any unique or unsettled issues of state law that warrant abstention based on comity concerns"); see also In re Adelphia Comms. Corp. Secs. and Derivative Litigation, 2003 WL 23018802, at *2 (S.D.N.Y. 2003), quoting Renaissance Cosmetics, Inc. v. Development Specialists, Inc., 277 B.R. 5, 16 (S.D.N.Y. 2002) (rejecting remand because "'[t]he movants . . . have not identified any state law claims that are 'unsettled or particularly difficult'");

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[8] See Memorandum of Law in Opposition to Motion to Dismiss and/or for Summary Judgment at 21.

[9] The Court can take judicial notice that on November 3, 1993, Norkin pleaded guilty in this Court to charges of bankruptcy fraud and conspiring to bribe a federal judge. See United States v. David Norkin, No. 93 DR 837 LAP. Because of his criminal convictions, Piper submits that Norkin could not plausibly have served as the corporate fiduciary of Britestarr as a Chapter 11 debtor-in-possession.

Nemsa Establishment, S.A. v. Viral Testing Sys. Corp., 1995 WL 489711, at *7 (S.D.N.Y. 1995), quoting Neuman v. Goldberg, 159 B.R. 681, 688 (S.D.N.Y. 1993) ("'[t]he fact that a complaint is based on state law causes of action does not mandate equitable abstention or remand, particularly where the state law claims are not novel or complex'"). Indeed, in Britestarr's parallel case against Piper, the identical issues are already before the federal court in Connecticut.

Fourth, it does not further the goal of state and federal comity to allow Norkin to bring claims in state court in New York concerning legal malpractice that allegedly occurred in connection with the bankruptcy case that he chose to file in Connecticut. As much as Norkin may wish to evade the federal forum that he originally invoked, it would be anomalous, at best, for a New York state court to decide a dispute in which the federal courts have already taken such an interest.[10]

Fifth, as Piper has already pointed out, the issues in this case overlap with legal and factual issues in Norkin's federal bankruptcy case and in Britestarr's federal bankruptcy case. Those issues include whether it was proper to recommend that Britestarr file for bankruptcy, whether it was proper to recommend that Norkin resign in favor of a court-appointed trustee, whether ABB ever made an actual settlement offer, whether Norkin knew of any such offer from Piper or any other source, and whether Norkin would have accepted such an offer (or whether he

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[10] Quoting Kerusa Co. v. W10Z/515 Real Estate L.P., 2004 U.S. Dist. Lexis 8168, at 18-19, Norkin complains (at 15) of the possibility that the court might transfer his case "'to another region of the country.'" His complaint is overblown. Piper has merely requested that the Court transfer the case 50 miles, to the federal court in Bridgeport, where Norkin elected to file his own bankruptcy case and where the closely-related Britestarr case is currently pending.

"would have rejected" it, as he said in his deposition). Those issues are hardly "remote," as Norkin claims, from those in his or Britestarr's bankruptcy case.

Sixth, contrary to Norkin's erroneous assertion, he will retain his right to a trial by jury even if the Court refers the case to a bankruptcy judge in this Court or if the Connecticut court (after transfer) refers the case to a bankruptcy judge in that court. Under 28 U.S.C. § 157(e), a bankruptcy judge may conduct a jury trial if all parties expressly consent. If, moreover, the parties do not all consent, then Norkin may move to withdraw the order of reference so that the jury trial can proceed in an Article III court. Blackwell v. Zollino (In re Blackwell ex rel. Estate of I.G. Services, Ltd.), 267 B.R. 724, 731 (Bankr. W.D. Tex. 2001); Schwinn Plan Committee v. AFS Cycle & Co. (In re Schwinn Bicycle Co.), 184 B.R. 945, 949 (Bankr. N.D. Ill. 1995); see also In re Adelphia Comms. Corp. Secs. and Derivative Litigation, 2003 WL 23018802, at *2 (stating that if the case is heard in a district court, "plaintiffs' right to a jury trial will not be compromised"). Therefore, if Norkin elects a trial by jury (which he has not yet done) and moves to withdraw any order of reference, he stands no chance of losing his right to a jury in federal court.

Seventh and finally, it is difficult to envision how Norkin could complain of any true prejudice in being required to litigate in federal court in Manhattan as opposed to state court in Manhattan. It is equally difficult to envision how Norkin could complain of prejudice in being required to litigate in the Connecticut court in which he voluntarily filed his bankruptcy petition. Thus unless the plaintiff's choice of forum is so strong as to give him the absolute right to veto any attempt to remove or to transfer a case, this final factor, like the others, weighs in Piper's favor.[11]

In summary, because of its factual and legal ties to both the Norkin and the Britestarr bankruptcy cases and because of the extent to which federal bankruptcy issues pervade the case, the federal courts should retain jurisdiction. Indeed, as Piper has requested, this Court should transfer the case to federal court in Connecticut, where it can proceed under the guise of Norkin's personal bankruptcy case. The Court, therefore, should deny Norkin's motion to abstain under § 1334(c)(1) or for equitable remand under § 1452(b).

III. CONCLUSION

For the foregoing reasons, the Court should deny the motion to remand.

Dated: New York, New York
January ___, 2006.

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[11] In the context of a core proceeding, such as this one, the courts recognize that the presumption in favor of plaintiff's choice of forum is cancelled out by the presumption in favor of conducting litigation in the same district in which the underlying bankruptcy case is pending. Official Committee of Asbestos Claimants of G-I Holding, Inc. v. Heyman, 306 B.R. 746, 750 (S.D.N.Y. 2004).

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AFFIDAVIT OF SERVICE

I, CONSTANCE S. SELLARS, being duly sworn, depose and state: I am over 18 years of age, am not a party to the foregoing action and reside within the City of Baltimore, State of Maryland.

On the nineteenth day of January, 2006, I caused the within Defendant's Opposition to Plaintiff's Motion to Remand to be served by delivering a true copy thereof enclosed in a sealed wrapper to the exclusive care of the United States Postal Service, with sufficient postage, to the counsel of record as follows:

Richard M. Asche, Esquire
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45 Broadway, 30th Floor
New York, New York 10006.

____
Constance S. Sellars

Sworn to before me this
day of January 2006

____
Notary Public

Seal of Notary Public